

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

<p>BRIAN FORAKER,</p> <p>Plaintiff,</p> <p>v.</p> <p>MATTHEW VOSHELL, DEBORAH VOSHELL, and CASALE CONSTRUCTION, LLC,</p> <p>Defendants,</p>	<p>C.A. No. N17L-12-054 WCC (Consolidated)</p>
<p>P&amp;C ROOFING, INC.,</p> <p>Plaintiff,</p> <p>v.</p> <p>CASALE CONSTRUCTION, LLC, MATTHEW VOSHELL, and DEBORAH VOSHELL,</p> <p>Defendants,</p>	<p>C.A. No. N18L-03-017 SKR</p>
<p>CASALE CONSTRUCTION, LLC,</p> <p>Plaintiff,</p> <p>v.</p> <p>MATTHEW VOSHELL AND DEBORAH VOSHELL,</p> <p>Defendants/Third-Party Plaintiffs,</p> <p>v.</p> <p>ANTHONY CASALE,</p> <p>Third-Party Defendant.</p>	<p>C.A. No. N18L-04-131 RRC</p>

Submitted: April 1, 2022  
Decided: July 1, 2022

## **Decision After Trial**

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**CARPENTER, J.**

## **I. INTRODUCTION AND PROCEDURAL BACKGROUND**

This action arises from claims relating to the construction of a custom home in Hockessin, Delaware. The case began with two subcontractor mechanic's liens filed against Matthew and Deborah Voshells' home located at 376 Skyline Orchard Drive, Hockessin, Delaware. Those commencing claims have since settled, and now, the Court is tasked with resolving the remaining dispute between Plaintiff, general contractor, Casale Construction, LLC, Third-party Defendant, Anthony Casale, President of Casale Construction, LLC, in his personal capacity, and Defendant, homeowners, Matthew and Deborah Voshell. More specifically, the Court must determine various breach of contract, statutory, and tortious claims asserted by both parties.<sup>1</sup> Finally, the Court must determine damages, attorneys' fees and costs owed, if any, to Casale Construction LLC and the Voshells.<sup>2</sup>

## **II. THE TRIAL**

In August of 2021, the Court conducted a six-day trial on the parties' factual and legal issues.<sup>3</sup> During trial, the Court heard from and considered the testimony of the following witnesses:

Anthony Casale  
Michael Cuocolo  
Brian Foraker

Mathew Voshell  
Deborah Voshell  
James Fulghum

Paul Brown

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<sup>1</sup> Joint Pre-Trial Stipulation, D.I. 65, p. 14-15 (July 29, 2021)(hereinafter "PTS").

<sup>2</sup> *Id.* at p. 15.

<sup>3</sup> Trial Worksheet, D.I. 68, p. 1-3 (Aug. 30, 2021).

The parties also submitted an extensive number of exhibits, most of which were admitted without objection and are cited herein by their designations as joint exhibits. After trial, counsel submitted closing arguments in writing. The Court apologizes to the parties for the delay in reaching this decision. Unfortunately, the Court's management of the COVID-19 related backlog caused other criminal matters to be addressed first.

### **III. FINDINGS OF FACT**

#### **A. The Parties**

Anthony Casale ("Mr. Casale") is a citizen of the State of Delaware.<sup>4</sup> He is named in this action individually, in his capacity as President of Casale Construction, LLC.<sup>5</sup>

Casale Construction, LLC ("Casale Construction") was formed by Mr. Casale in 1989.<sup>6</sup> Casale Construction is a limited liability corporation organized and existing under the laws of the State of Delaware with its principal place of business located in Wilmington, Delaware.<sup>7</sup> Casale Construction provides residential and commercial construction services.<sup>8</sup> Since its inception, Casale Construction has built hundreds of commercial and residential homes.<sup>9</sup>

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<sup>4</sup> Trial Tr. Aug. 16, 2021, N17L-12-054, at (unpaginated) 19 (hereinafter "Trial Tr. Aug. 16").

<sup>5</sup> Trial Tr. Aug. 16, at (unpaginated) 20.

<sup>6</sup> *Id.*

<sup>7</sup> PTS at p. 6, at (b).

<sup>8</sup> Trial Tr. Aug. 16, at (unpaginated) 20.

<sup>9</sup> *Id.* at (unpaginated) 22.

Matthew and Deborah Voshell (individually, “Mr. Voshell” and “Mrs. Voshell” and together, “the Voshells”) are citizens of the State of Delaware. The Voshells are the owners of 376 Skyline Orchard Drive, Hockessin, DE 19707 (the “Property”).<sup>10</sup>

B. In 2016, the Voshells purchased the Property and selected Casale Construction as General Contractor to build their home.

In early 2016, the Voshells purchased the Property and hired Paul Kelly Brown (“Mr. Brown”), of the architectural firm Red Clay Associates, to design building plans.<sup>11</sup> By May of 2016, Mr. Brown designed a “bid set,” used to solicit bids from various builders.<sup>12</sup> After conferring with three or four builders, the Voshells hired Casale Construction to build their home.<sup>13</sup>

On June 15, 2016, the Voshells executed a preliminary contract with Casale Construction for the sole purpose of obtaining a construction loan from Citizens Bank (“Citizens”).<sup>14</sup> Citizens approved the Voshells’ construction loan totaling \$640,000 but computed the draw schedule based on \$602,500.<sup>15</sup> The draw schedule

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<sup>10</sup> Trial Tr. Aug. 23, 2021, N17L-12-054, p. 7 (hereinafter “Trial Tr. Aug. 23”).

<sup>11</sup> *Id.* at 152.

<sup>12</sup> *Id.* at 154-5.

<sup>13</sup> *Id.* at 157-8.

<sup>14</sup> *Id.* at 160.

<sup>15</sup> *Id.*

was structured to include a total of nineteen draws from October 15, 2016, through November 17, 2017, and a single deposit on August 22, 2016.<sup>16</sup>

### C. The Construction Agreement

On August 18, 2016, the final contract was executed between the Voshells and Casale Construction (the “Contract”).<sup>17</sup> Pursuant to the Contract, construction was scheduled to commence on August 19, 2016, but no completion date was stated.<sup>18</sup> The Contract price was \$545,000.<sup>19</sup> The Contract consists of the “Standard Form Agreement between Owner and Contractor,” the “General Conditions of the Contract for Construction,” Building Plans dated August 23, 2016, the Line Item Draw Schedule, and a Specification Sheet dated August 24, 2016.<sup>20</sup>

The Contract listed Casale Construction as the Contractor, the Voshells as Owners, and Red Clay Associates (“Red Clay”) as the Architect.<sup>21</sup> Under Article Five, payments were to be submitted by Casale Construction to Red Clay for certification, and then the Voshells were obligated to tender payment within five days after Red Clay certification.<sup>22</sup> Moreover, Section 5.1.2 required the Voshells

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<sup>16</sup> PTS at p. 2.

<sup>17</sup> JX-2, p. 1 (Construction Contract between Casale Construction and the Voshells, Aug. 18, 2016).

<sup>18</sup> *Id.* at §3.1.

<sup>19</sup> *Id.* at §4.1.

<sup>20</sup> *Id.* at §8.1

<sup>21</sup> *Id.* at p. 1.

<sup>22</sup> *Id.* at §5.1.1, §5.1.3.

to make two monthly payments occurring on the 15<sup>th</sup> and 30<sup>th</sup> of every month.<sup>23</sup> The parties also agreed in Section 3.4 that Casale Construction was required to provide the materials and labor needed for the project pursuant to the Plans.<sup>24</sup>

Additionally, the Contract contains various termination provisions for both Casale Construction and the Voshells. Specifically, Section 14.1.1.3 permits Casale Construction to terminate the Contract if the Voshells fail to make payment within five days.<sup>25</sup> Moreover, Article 14 states that Casale Construction could provide seven days written notice of its intent to terminate and still recover from the Voshells for work completed.<sup>26</sup>

Similarly, the Voshells have two avenues of termination, either (1) for cause or (2) for convenience.<sup>27</sup> Section 14.2.2 details “for cause” termination and requires certification by Red Clay justifying such action and seven days’ written notice provided to Casale Construction by the Voshells.<sup>28</sup> Section 14.4.3 details “for convenience” termination that allows the Voshells to terminate at any time, without

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<sup>23</sup> *Id.* at §5.1.2.

<sup>24</sup> JX-107 (General Conditions of the Contract for Construction AIA A201-1997) at §3.4.

<sup>25</sup> *Id.* at §14.1.1.3.

<sup>26</sup> *Id.* at §14.1.3.

<sup>27</sup> *Id.* at §14.2, 14.4.

<sup>28</sup> *Id.* at §14.2.2.

cause, but Casale Construction is entitled to be paid for work executed and costs incurred, along with reasonable expected profits for work not done.<sup>29</sup>

D. After delays, Construction on the Voshell home began in November of 2016.

Although scheduled to commence on August 19, 2016, construction was delayed until November because of county building permit delays and engineering surveys.<sup>30</sup> During those delays, Casale Construction cleared the lot and excavated the site, earning the first two draw payments.<sup>31</sup> Casale Construction employed Steve Boyd (“Mr. Boyd”) and Leo Vitale (“Mr. Vitale”) to supervise and manage the Voshell jobsite throughout construction.<sup>32</sup> Casale Construction also hired various subcontractors to perform specialized trade work on the home, including carpenter Brian Foraker (“Mr. Foraker”), Edward Powell Pump and Well Drilling, P&C Roofing, and Bell Supply, among others.<sup>33</sup>

E. Architect Paul “Kelly” Brown became Voshells’ “second set of eyes” to monitor Casale Construction progress and work product.

From January to March 2017, Casale Construction began framing the house, completed the roof, installed the well on the property, and began the plumbing

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<sup>29</sup> *Id.* at § 14.4.3.

<sup>30</sup> Trial Tr. Aug. 23, at 82; Trial Tr. Aug. 17, 2021, N17L-12-054, at 103-4 (hereinafter “Trial Tr. Aug. 17”).

<sup>31</sup> Trial Tr. Aug. 16, at (unpaginated) 114.

<sup>32</sup> Trial Tr. Aug. 18, 2021, N17L-12-054, at 46-7 (hereinafter “Trial Tr. Aug. 18”).

<sup>33</sup> *Id.*; *See* JX-20 (Vendor Quick Report) at 000925, 000937, and 000944.



rough-in.<sup>34</sup> However, in February of 2017, the Voshells asked Mr. Brown to take on a more active role supervising the construction and to act as their “second set of eyes” after noticing some construction errors by Casale Construction.<sup>35</sup>

On the third day of trial, the Voshells called Mr. Brown to testify regarding Casale Construction’s progress and workmanship on the home.<sup>36</sup> Mr. Brown is a Registered Architect and graduated from Drexel University with a Bachelor of Architecture degree in 2001.<sup>37</sup> Since then, he has worked on many commercial and residential projects, often tasked with drafting and preparing documents, issuing permits, and ensuring that contractors are following building plans.<sup>38</sup> Mr. Brown explained he has worked on approximately two to three custom homes every year for the last thirty years, has extensive knowledge of the building code, and experience with project management.<sup>39</sup>

Mr. Brown testified that his role in the Voshells’ home construction changed when the Voshells discovered framing issues with the bi-level, first-floor of the home.<sup>40</sup> In that instance, Mr. Brown testified that he spoke with Mr. Boyd, the onsite

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<sup>34</sup> JX-45 (Bank Inspection Report #5, Jan. 9, 2017); JX-50 (Bank Inspection Report #10, Feb. 16, 2017); JX-51 (Bank Inspection Report #11, Feb. 28, 2017).

<sup>35</sup> Trial Tr. Aug. 18, at 111.

<sup>36</sup> *Id.* at 99.

<sup>37</sup> *Id.* at 99; JX-33 (Paul Brown Resume) at (unpaginated) 2.

<sup>38</sup> Trial Tr. Aug. 18, at 102.

<sup>39</sup> *Id.* at 102-3, 107.

<sup>40</sup> *Id.* at 111.

manager, and that the issue was corrected and paid for by Casale Construction.<sup>41</sup> Mr. Brown recounted that when he discovered an error, he would inform the Voshells, the onsite manager, and occasionally Mr. Casale if it was extremely serious.<sup>42</sup> Mr. Brown disclosed, to his knowledge, that it is common for the architect to work onsite with the contractor to ensure that building drawings are followed.<sup>43</sup>

From February 2017 to May 2018, Mr. Brown made regular site visits, photographed issues and progress, and met with site managers and subcontractors to ensure that progress was made.<sup>44</sup> His documentation focused on parts of the home that seemed to deviate from the Plans.<sup>45</sup>

F. Voshells and Casale Construction changed the Draw Procedure.

As of March 1, 2017, Casale Construction received the entirety of Draws #1 to #11.<sup>46</sup> Those draws were disbursed directly to Casale Construction from Citizens.<sup>47</sup> However, on March 9, 2017, the Voshells and Casale Construction modified the draw disbursement agreement and redirected disbursement to the Voshells.<sup>48</sup> This new process started with Draw #12 until final Draw #19, and required that Casale

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<sup>41</sup> *Id.* at 112.

<sup>42</sup> *Id.* at 148-149.

<sup>43</sup> *Id.* at 114.

<sup>44</sup> *Id.* at 115.

<sup>45</sup> *Id.* at 125.

<sup>46</sup> JX-110 (Distribution of Draw Proceeds).

<sup>47</sup> Trial Tr. Aug. 23, at 180-2.

<sup>48</sup> JX-111 (Disbursement Authorization Instructions, Mar. 9, 2017).

Construction request the draw from the Voshells, who would contact Citizens and schedule an inspection.<sup>49</sup>

Prompting this change was the Voshells' special-order Anderson windows from Tague Lumber in October 2016.<sup>50</sup> The windows were custom designed, and the order was finalized around January or February 2017.<sup>51</sup> Mr. Casale, Mr. Brown, and the Voshells all approved the window order because it was custom and expensive, costing approximately \$70,000.<sup>52</sup>

Before the order could be placed, a Tague Lumber Representative informed the Voshells that a fifty percent deposit was required.<sup>53</sup> That request caused a month-long delay because the Voshells and Casale Construction could not use money from the construction loan.<sup>54</sup> The Voshells agreed to pay the deposit outside of the Contract to keep the job moving.<sup>55</sup> In return, Casale Construction agreed that the Voshells could retain Draw #13 to recoup their out-of-pocket costs.<sup>56</sup> The windows were ordered on March 8, 2017, and installed in April 2017.<sup>57</sup>

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<sup>49</sup> *Id.*; JX-110.

<sup>50</sup> Trial Tr. Aug. 23, at p. 187.

<sup>51</sup> *Id.* at 187.

<sup>52</sup> *Id.* at 188.

<sup>53</sup> *Id.* at 191.

<sup>54</sup> *Id.* at 191.

<sup>55</sup> *Id.* at 191-2.

<sup>56</sup> Trial Tr. Aug. 16, (unpaginated) at 124, 163; JX-110.

<sup>57</sup> Trial Tr. Aug. 23, at 192.

G. The Voshells and Mr. Casale's relationship deteriorated during the Summer of 2017.

From Summer to Fall of 2017, the Voshells and Mr. Casale's relationship began to slowly deteriorate. The Voshells testified that progress was slow, and framing, siding, and drywall took longer than expected.<sup>58</sup>

In July 2017, the Voshells attempted to retain portions of Draw #15 to reimburse themselves for out-of-pocket expenses and deposits on materials, as they had done with the window order.<sup>59</sup> However this time, Mr. Casale demanded full payment and responded that the draw money is meant to be paid to Casale Construction and cannot be "discounted."<sup>60</sup> Mr. Casale further argued that the draw schedule issues are the Voshells' fault because it is their agreement with Citizens.<sup>61</sup>

Around that time, the Voshells started asking for meetings with Mr. Casale directly, instead of with the site managers, because they were witnessing long delays in work, and also wanted to discuss future payments and current accounting.<sup>62</sup> Mrs. Voshell testified that the Voshells, at a minimum, asked for a meeting with Mr. Casale once a month from August to October 2017.<sup>63</sup> Unfortunately, the Voshells

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<sup>58</sup> Trial Tr. Aug. 24, 2021, P.M., N17L-12-054, at 31 (hereinafter "Trial Tr. Aug. 24 P.M.").

<sup>59</sup> *Id.* at 23-4.

<sup>60</sup> *Id.* at 25; JX-125 (E-mails between Anthony Casale and Deborah Voshell July 28-31, 2017).

<sup>61</sup> Trial Tr. Aug. 24 P.M., at 25; JX-125.

<sup>62</sup> Trial Tr. Aug. 24 P.M., at 22.

<sup>63</sup> *Id.* at 31.

and Mr. Casale never sat for a meeting to discuss any of those concerns reflecting the deterioration of their relationship.<sup>64</sup>

On October 8, 2017, Mrs. Voshell visited the Property, and Mr. Casale was onsite.<sup>65</sup> Mrs. Voshell recalled informing Mr. Casale that subcontractors were telling the Voshells that they had not been paid, specifically, Brian Foraker, Bricker Electric and Bell Supply.<sup>66</sup> Mr. Casale reassured her that it was not true.<sup>67</sup>

After the impromptu meeting at the Property, Mr. Casale followed up with an email to the Voshells later that afternoon.<sup>68</sup> Mr. Casale stated that he was very upset about those accusations and that, “[Casale Construction] does NOT leave any open invoices anywhere[.]”<sup>69</sup> Mr. Casale also accused the Voshells of organizing work with subcontractors without the knowledge and consent of Casale Construction.<sup>70</sup> Mr. Casale then warned the Voshells that they should be more worried about owing money to Casale Construction, rather than subcontractors, and “the only lien [the Voshells] should be concerned about is [Casale Construction’s].”<sup>71</sup>

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<sup>64</sup> *Id.* at 27-28.

<sup>65</sup> Trial Tr. Aug. 24, 2021, P.M., N17L-12-054, at 33 (hereinafter “Trial Tr. Aug. 24 P.M.”).

<sup>66</sup> *Id.* at 34, 36.

<sup>67</sup> *Id.* at 34.

<sup>68</sup> JX-126 (Emails between the Voshells and Mr. Casale Oct. 8, 2017).

<sup>69</sup> *Id.* at VOS13299.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

H. Casale Construction left the project because the Voshells withheld and conditioned Draw #19.

On November 13, 2017, Casale Construction emailed the Voshells asking for an inspection to be ordered and a draw request to be submitted to Citizens for work completed.<sup>72</sup> The Voshells promptly submitted the draw request to Citizens the following day.<sup>73</sup>

On November 15, 2017, the Voshells informed Mr. Casale, Mr. Vitale, and Ms. Terri Jamgochian (“Ms. Jamgochian”), Casale Construction’s Office Administrator, that they would not release the requested funds until the following conditions were met, “(1) [t]he extension fee is paid plus inspection fee of \$110; and (2) [a] meeting is scheduled with Tony Casale, Leo, Terri to discuss this and future draws.”<sup>74</sup> Ms. Jamgochian, on behalf of Casale Construction, responded on the same day and explained that the requested funds are for completed work, and timely payment was required pursuant to the Contract.<sup>75</sup>

On November 17, 2017, Draw #19 was disbursed to the Voshells in the amount of \$40, 216.87.<sup>76</sup> But, the Voshells did not inform Casale Construction that the draw was disbursed.<sup>77</sup> Instead, Ms. Jamgochian inquired on November 21, 2017,

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<sup>72</sup> JX-114 (E-mails between Casale Construction and the Voshells, Nov. 13-21, 2017) at 517.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 515.

<sup>75</sup> *Id.* at 514-15.

<sup>76</sup> JX-110.

<sup>77</sup> JX-114 at 639.

whether the Voshells intended to pay Casale Construction.<sup>78</sup> The Voshells again demanded a meeting with Mr. Casale, Mr. Vitale, and Ms. Jamgochian to discuss the status of the home and also demanded Casale Construction pay the loan extension fee and inspector fee.<sup>79</sup> The Voshells explained that “no funds [would] be released to Casale” until their conditions were met.<sup>80</sup>

Ms. Jamgochian reiterated that the draw requests are for work completed and bank approved and, therefore, no conditions can be set on payment.<sup>81</sup> Mr. Casale also responded adopting Ms. Jamgochian’s sentiments and explained that pursuant to the Contract, payment must be made within five days.<sup>82</sup> He further conditioned that if payment was not made by 3:30 p.m. on November 21, 2017, then he threatened to “pull from the job.”<sup>83</sup> The Voshells did not make payment and the parties never met.<sup>84</sup> Casale Construction stopped working on the Property December 6, 2017, and, at that time, the Voshell home was only eighty percent finished, according to Bank Inspection reports.<sup>85</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 639.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 638.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Trial Tr. Aug. 23, at 131; JX-110.

<sup>85</sup> PTS. at ¶¶ o-p, p. 9.

## I. Payments and Change Orders

Prior to Casale Construction's termination, the Voshells made advanced payments equaling \$127,700 for materials for the home.<sup>86</sup> Those materials were (1) cabinetry deposit for \$26,500; (2) hardwood flooring for \$12,000, (3) garage door for \$5,200, (4) interior doors for \$7,000, (5) stairs for \$7,000, and (6) windows and doors for \$70,000.<sup>87</sup>

During construction, the Voshells requested various changes increasing the cost of the home, not calculated in the total.<sup>88</sup> The change order procedure started with an email from Ms. Jamgochian outlining the requested change and an estimate of cost, then the Voshells would review it and decide if they were going to approve it.<sup>89</sup> From there, the Voshells would sign the change order or email their approval.<sup>90</sup> There are twenty-four documented change orders from Casale Construction, and considerable disputed testimony and evidence regarding the veracity of those changes.

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<sup>86</sup> JX-29(Out of Pocket Expenses paid as of 3/1/2018) at VOS17425-17426.

<sup>87</sup> *Id.*

<sup>88</sup> Trial Tr. Aug. 23, at 22-3.

<sup>89</sup> *Id.* at 205-6.

<sup>90</sup> *Id.*



J. The Voshells obtained a Homeowner General Contractor Permit and earned the Certificate of Occupancy May 3, 2018.

No work occurred at the Property from the time Casale Construction left the project until the Voshells applied and received a homeowners permit from New Castle County on March 1, 2018.<sup>91</sup> Mr. Voshell became the general contractor and started soliciting bids for the remaining work to be completed.<sup>92</sup> He testified that he had to hire approximately thirteen subcontractors to finish the project.<sup>93</sup> Voshells obtained the Certificate of Occupancy on May 3, 2018.<sup>94</sup>

#### IV. STANDARD OF REVIEW

In a bench trial, the Court is the finder of fact.<sup>95</sup> The elements of each claim must be proven by a preponderance of the evidence.<sup>96</sup> “Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not.”<sup>97</sup> Additionally, “it is up to the Court to weigh the credibility of witnesses and resolve

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<sup>91</sup> *Id.* at 137.

<sup>92</sup> *Id.* at 139.

<sup>93</sup> *Id.* at 138-40.

<sup>94</sup> *Id.* at 63; JX-018 (Certificate of Occupancy May 3, 2018).

<sup>95</sup> *Bridev One, LLC v. Regency Centers, L.P.*, 2016 WL 8604393, at \*8 (Del. Super. Ct. Oct. 31, 2016).

<sup>96</sup> *Id.*

<sup>97</sup> *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at \*13 (Del. Ch. Feb. 18, 2010).

conflicts in witness testimony.”<sup>98</sup> Furthermore, the Court shall find in favor of the party upon whose side “the greater weight of the evidence is found.”<sup>99</sup>

## **V. DISCUSSION**

At trial there were five central issues to be resolved: (1) whether Casale Construction may execute a valid mechanic’s lien against the Property; (2) whether relief is available under the Delaware Prompt Payment Act; (3) determination of which party breached the contract, (4) whether Mr. Casale committed fraud; and (5) whether either party is entitled to attorney’s fees or prejudgment interest, and calculation of damages.

### **A. MECHANIC’S LIEN**

Casale Construction seeks the entry of an *in rem* mechanic’s lien judgment in the amount of \$165,194.87 against the Property.<sup>100</sup> Casale Construction carries the burden and maintains that it satisfies the three requirements under the mechanic’s lien statute because: (a) the work exceeds the \$25 threshold, (b) the parties executed a valid Contract, and (c) Casale Construction provided the Voshells a completed and accurate writing of all persons who have furnished labor or material in connection with the Property.<sup>101</sup>

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<sup>98</sup> *Id.* (citing *Liberto v. Gilbert*, 2015 WL 9048087, at \*2 (Del. Super. Ct. Dec. 4, 2015)).

<sup>99</sup> *Id.* (citing *Pouls v. Windmill Estates, LLC*, 2010 WL 2348648, at \*4 (Del. Super. Ct. June 10, 2010)).

<sup>100</sup> 25 *Del. C.* § 2702-2703, 2705.

<sup>101</sup> Pl.’s Closing Arg., D.I. 71, at 1-2 (Sept. 20, 2021).

Conversely, the Voshells contend that Casale Construction's mechanic's lien is procedurally barred pursuant to Section 2705 because Casale Construction was not able to provide a "complete and accurate list" of the entities who provided materials and labor.<sup>102</sup> Moreover, the Voshells explain that the lien is precluded under Section 2707 because they have fully paid through October 13, 2017, and Casale Construction failed to establish that they are due more.<sup>103</sup>

A mechanic's lien proceeding is entirely statutory in origin and has been repeatedly held to be in derogation of the common law which requires the mechanic's lien statute be "strictly construed and pursued."<sup>104</sup> The validity of such a lien depends upon an affirmative showing that every essential statutory step in the creation of the lien has been duly followed.<sup>105</sup> It is well settled that the mechanic's lien statute requires strict compliance from those seeking a lien but strict compliance does not require an unreasonable or unwarranted construction of the statute.<sup>106</sup>

The Court finds that Casale Construction failed to meet its burden and, therefore, is not entitled to a mechanic's lien on the Property. To start, the parties stipulated that Casale Construction's claim exceeds \$25 and that the parties have a valid

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<sup>102</sup> Defs.' Closing Arg., D.I. 70, at 4 (Sept. 20, 2021).

<sup>103</sup> *Id.* at 4.

<sup>104</sup> *Ceritano Brickwork, Inc. v. Kirkwood Indus., Inc.*, 276 A.2d 267, 268 (Del. 1971).

<sup>105</sup> *Id.*

<sup>106</sup> *North Star, Inc. v. F. Tropea Bldg. Contractor, LLC*, 2009 WL 2963771, at \*1 (Del. Super. Ct. Sept. 16, 2009).

contract regarding the construction of the Property.<sup>107</sup> But, Section 2705 requires Casale Construction to provide, a “complete and accurate list” of any entities who did work or provided materials for construction of the Property.<sup>108</sup> That list must be furnished within ten days of homeowner request.<sup>109</sup>

Mr. Casale conceded at trial that the Voshells requested a list of materialmen on January 29, 2018.<sup>110</sup> The list was served late on April 3, 2018, before the filing of the Mechanic’s Lien Complaint on April 26, 2018.<sup>111</sup> Moreover, Mr. Casale testified that the Job Costs and Vendor Summary Report is the most accurate information regarding the entities that performed work or provided materials for the Voshell project.<sup>112</sup> However, in reconciling the Summary Report and the list furnished by Casale Construction on April 3, 2018, it is clear that at least ten entities that appear on the Summary Report were not included on the list submitted for the Mechanic’s Lien.

This defect is precisely the kind the statute seeks to protect homeowners against because the purpose of Section 2705 is:

to permit an owner to learn the identity of the persons who may obtain mechanics’ liens on the owner’s property, and if the contractor does not

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<sup>107</sup> PTS at p. 8-9, (a) and (n).

<sup>108</sup> 25 *Del. C.* § 2705.

<sup>109</sup> *Id.*

<sup>110</sup> Trial Tr. Aug. 18, at 29.

<sup>111</sup> JX-17 (Casale Construction’s subcontractors and materialmen for the Property, Apr. 2, 2018).

<sup>112</sup> Trial Tr. Aug. 17, at 148-50.

supply the owner with a list of persons who may obtain mechanics' liens, then the contractor "shall not avail himself of any provisions" of the mechanics' lien statute.<sup>113</sup>

Therefore, since the list is incomplete, it cannot support Casale Construction's claim for an *in rem* mechanic's lien. Accordingly, the Court finds that Section 2705 bars Casale Construction's Mechanic's Lien against the Voshells' Property.

## **B. BREACH OF CONTRACT**

Casale Construction asserts that the Voshells breached the contract when they withheld earned funds without a justifiable reason, causing Casale Construction damages.<sup>114</sup> Conversely, the Voshells assert that Casale Construction committed three breaches of the Contract, justifying the Voshells' decision to withhold payment.<sup>115</sup> The Voshells contend that Casale Construction breached when: (1) the Voshells were required to pay for materials included under the Contract, (2) Casale Construction failed to perform in a workmanlike manner, (3) and Casale Construction caused unreasonable delays and failed to pay subcontractors timely.<sup>116</sup>

Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation, (2) a breach of that obligation, and (3) resulting damages.<sup>117</sup> Generally, "[a] party is excused from performance under a contract if the other party

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<sup>113</sup> *Carey v. Estate of Myers*, 2015 WL 4087056, at \*20 (Del. Super. Ct. July 1, 2015).

<sup>114</sup> Defs.' Closing Arg. at 1-2.

<sup>115</sup> *Id.* at 4.

<sup>116</sup> *Id.* at 6, 7, 8, 11.

<sup>117</sup> *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 548 (Del. Super. Ct. Feb. 4, 2005).

is in material breach thereof.”<sup>118</sup> A material breach acts as a termination of the contract going forward, abrogating any further obligations to perform by the non-breaching party.<sup>119</sup> “Conversely, a slight breach of one party, while giving rise to an action for damages, does not terminate the obligations of the injured party under the contract.”<sup>120</sup> “Failure to perform by the injured party after a non-material breach constitutes breach of contract by the injured party.”<sup>121</sup>

The question of whether a breach arises to the level of materiality “is one of degree” and is determined by “weighing the consequences in light of the actual custom of men in the performance of contracts similar to the one that is involved in the specific case.”<sup>122</sup> The Superior Court has adopted the Restatement (Second) of Contracts to determine whether a breach is material and will weigh the following factors:

(1) the extent to which the injured party will be deprived of a reasonably expected benefit; (2) the extent to which the injured party can be reasonably compensated for any such loss; (3) the extent to which the party failing to perform will suffer forfeiture; (4) the likelihood that the party failing to perform will cure his failure, taking into account, all of the circumstances including any reasonable assurances; and (5) the extent to which the behavior of the party failing to perform comports with the standards of good faith and fair dealing.<sup>123</sup>

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<sup>118</sup> *Carey v. Estate of Myers*, 2015 WL 4087056, at \*20 (Del. Super. Ct. July 1, 2015).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at \*20.

<sup>123</sup> *Id.* at \*20; *See* Restatement (Second) of Contracts §241.

Additionally, the non-materially breaching party may still be liable for damages for its own non-material breaches prior to the terminal, material breach.<sup>124</sup>

Both parties agree that the Contract governs their relationship.<sup>125</sup> The parties also agree that the original Contract amount to build the Voshells' home was \$545,000 and \$52,475 in change orders were approved by the Voshells.<sup>126</sup> The parties, however, both allege that the other materially breached the contract first and, in turn, argue that their own breaches are excused. Each party bears the burden of establishing their respective breach of contract claims.

To start, the Court finds that almost from the beginning of the Contract until the time Casale Construction pulled from the job, both parties had not fully complied with the Contract, but were continuing to work cooperatively and for their convenience within the relationship created by their course of conduct. Therefore, although the parties did not comply with the language of the Contract, their subsequent actions and discussions modified those original terms.

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<sup>124</sup> *Carey*, 2015 WL 4087056, at \*20.

<sup>125</sup> JX-2; JX-107.

<sup>126</sup> PTS at 8.

1. Casale Construction did not breach the Contract by failing to provide all construction materials because the Voshells offered to pay and work around that contractual provision.

First, the Voshells contend that Casale Construction breached the express terms of the Contract by not providing materials for the Voshell project. Section 3.4.1 states:

[u]nless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.<sup>127</sup>

Based on testimony and evidence, it appears the parties disregarded that section and formed a new understanding with respect to various materials required for the Property. The Voshells paid out-of-pocket, and outside of the Contract, for cabinetry, hardwood flooring, the garage door, interior doors, stairs, and windows. Those transactions occurred after conversations between the Voshells and Casale Construction indicated that there may be issues ordering materials with draw funds.

The Court finds that the Voshells voluntarily worked around this provision by ordering materials and organizing delivery with Casale Construction. For example, Mrs. Voshell recalled that Casale Construction was trying to resolve the down payment issue for the window order because it had yet to receive the corresponding

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<sup>127</sup> JX-107 at § 3.4.1.



draw money. Mrs. Voshell stated that the Voshells decided to pay for the deposit out-of-pocket so that the windows could be ordered. In doing so, the parties agreed the Voshells would retain Draw #13 to recoup their expenses.

Mrs. Voshell also recalled that the Voshells offered to pay the deposits for the stairs and other out-of-pocket items that were included in the Contract. Unfortunately, besides the agreement including the windows and Draw #13, the parties failed to consider how the Voshells would be compensated for the other out-of-pocket expenses and there were no similar agreements allowing them to withhold other draw payments. Accordingly, the Voshells were willing to work around the parameters of Section 3.4.1 and made construction material payments in order for Casale Construction to finish their home. The Court finds this was a voluntarily, agreed upon undocumented modification based upon their interest in completing the home. As such, Casale Construction did not breach the Contract when the Voshells ordered materials for the Property outside of the Contract.

2. Casale Construction did not breach the Contract for delays because there was no completion date stated in the Contract.

Second, the Voshells assert that Casale Construction breached the Contract by causing unexplained delays and by failing to finish the home within its six-to-seven-month estimate.<sup>128</sup> But, Casale Construction asserts that the Contract did not contain

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<sup>128</sup> Defs.' Closing Arg. at p. 9-10.

a completion date nor a time of the essence clause, and therefore, no breach occurred based on the construction timeline.<sup>129</sup>

Delaware “law presumes contracting parties are familiar with time of the essence clauses and that they know how to make time of the essence if they so desire.”<sup>130</sup> When time is of the essence in a contract, a failure to perform by the time stated is a material breach of the contract that will discharge the non-breaching party’s obligation to perform its side of the bargain.<sup>131</sup> Whether time is of the essence in a contract turns on whether the contract expressly states it or there are circumstances surrounding the contract that clearly indicate a specific timeframe, neither of which are present here.<sup>132</sup>

The parties did not include a completion date or a “time is of the essence” clause in the Contract and, therefore, Casale Construction did not breach the contract with its building timeline. Moreover, Mr. Casale and site managers only provided “good faith estimates” to the Voshells, and even Defendant’s expert witness, Mr. Brown, conceded that such a project would take approximately a year to build, which supports the reality of the Voshell project, even with the alleged delays. Consequently, the Voshells’ expected timeline of six-to-seven months is

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<sup>129</sup> Pl.’s Closing Arg. at p. 18.

<sup>130</sup> *Parexel Intern’l (IRL) Ltd. v. Xynomic Pharma., Inc.*, 2021 WL 3074343, at \*13 (Del. Super. Ct. July 21, 2021).

<sup>131</sup> *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at \*9 (Del. Ch. May 2, 2007).

<sup>132</sup> *Id.*

unsupported as it only appears in the Proposal and not in the Contract. Therefore, the Court finds that Casale Construction did not breach the Contract with respect to that claim.

3. Casale Construction did breach by failing to perform in a workmanlike manner and in conflict with the building code.

Next, the Voshells contend that Casale Construction failed to perform in a workmanlike manner by deviating from the Plans and the relevant industry standard and building code.<sup>133</sup> But, Casale Construction contends that any building issues were not the bases for the Voshells conflict with their builder, but rather, their focus was on delays and subcontractor payments.<sup>134</sup>

Delaware law recognizes the implied builder's warranty of good quality and workmanship and, here, the Contract specifically requires it.<sup>135</sup> Section 3.5.1 states:

[Casale Construction] warrants to the [Voshells and Mr. Brown] that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective.<sup>136</sup>

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<sup>133</sup> Defs.' Closing Arg. at 8.

<sup>134</sup> Pl.'s Closing Arg. at 21.

<sup>135</sup> *Council of Unit Owners of Breakwater House Condo. v. Simpler*, 603 A.2d 792, 795 (Del. 1992); *Smith v. Berwin Builders, Inc.*, 287 A.2d 693, 695 (Del. Super. Ct. Jan. 31, 1972).

<sup>136</sup> JX-107 at §3.5.1, p. 14.

In determining whether the contractor's work was performed in a workmanlike manner, the standard is whether the party "displayed the degree of skill or knowledge normally possessed by members of their profession or trade in good standing in similar communities" in performing the work.<sup>137</sup> The customer is not entitled to excellence, but the standard is reasonableness and requires compliance with the building code.<sup>138</sup>

The Voshells called Mr. Brown, of Red Clay, as a witness to support their contention.<sup>139</sup> Mr. Brown's expert report included photographs accompanied with descriptions of the issues he identified when visiting the Property.<sup>140</sup> Mr. Brown testified that, overall, the Casale Construction subcontractors struggled to complete the work, especially at the framing stage.<sup>141</sup>

Mr. Brown highlighted approximately fourteen areas of the home that did not comply with the Plans.<sup>142</sup> Of those defects, Mr. Brown testified that two errors were violations of the New Castle County building code: incorrect exterior wall framing in violation of 2015 IRC Section R317.5<sup>143</sup> and missing vapor retarder in violation

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<sup>137</sup> *Shipman v. Hudson*, 1993 WL 54469, at \*3 (Del. Super. Ct. Feb. 5, 1993).

<sup>138</sup> *Duncan v. JBS Const., LLC*, 2016 WL 1298280, at \*3 (Del. Ct. C. P. Mar. 31, 2016).

<sup>139</sup> Trial Tr. Aug. 18, at 99.

<sup>140</sup> JX-32 (Mr. Brown's Report Documenting Deviations from Building Plans); Trial Tr. Aug. 18, at 123.

<sup>141</sup> Trial Tr. Aug. 18, at 116.

<sup>142</sup> JX-32.

<sup>143</sup> Trial Tr. Aug. 18, at 128.

of 2015 IRC Section R506.2.3.<sup>144</sup> Moreover, those errors were unable to be remedied or traditionally fixed.<sup>145</sup> Casale Construction made other errors but it is unclear whether those errors arise to building code violations.

Casale Construction did not offer rebuttal testimony to negate the findings of Mr. Brown. Mr. Casale testified that he relied on site managers, subcontractors, and the bank inspector to conclude what work was completed.<sup>146</sup> The Court heard from none of them.

In reviewing the evidence, the Court finds that Casale Construction breached the contract by failing to comport with the building code and by committing errors outside of the construction drawings. Therefore, the Voshells are entitled to damages. In some instances, Casale Construction was able to complete and pay for corrective work. There were, however, other instances where the work was unable to be corrected and the Court finds that the Voshells did not receive their benefit of the bargain because Casale Construction failed to perform in a skillful or workmanlike manner. Accordingly, Casale Construction materially breached the Contract.

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<sup>144</sup> *Id.* at 128, 147-8.

<sup>145</sup> Trial Tr. Aug. 18, at 139 (“Not that I would consider traditional—there is probably some way to, you know, an alternative.”); *Id.* at 148 (Q: And was that ever corrected? A: No. I don’t know because I don’t know how you would do it after the forms are completely set...it didn’t occur.”).

<sup>146</sup> Trial Tr. Aug. 17, at 176-77.

4. The Voshells breached the Contract by failing to tender full earned payments to Casale Construction.

Lastly, Casale Construction contends that the Voshells breached the contract by failing to tender earned draw payments within five days pursuant to their Contract.<sup>147</sup> The Voshells contend they were justified in retaining their funds and acted within their rights expressed in Section 5.1.6.4. of the Contract.<sup>148</sup> The Voshells assert there was a reasonable likelihood that the home could not be completed with the unpaid balance, and they offered to meet with Casale Construction multiple times to avoid withholding payments.<sup>149</sup>

Delaware courts will interpret clear and unambiguous terms according to their ordinary meaning.<sup>150</sup> “Contract terms themselves will be controlling when they establish the parties’ common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language.”<sup>151</sup> In accordance with the objective theory of contracts, Delaware courts look to the plain language of the purported agreement, but may also consider other evidence, such as the parties’ subsequent conduct, to determine intent and meaning.<sup>152</sup>

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<sup>147</sup> Pl.’s Closing Arg. at 10, 14.

<sup>148</sup> Defs.’ Closing Arg. at 17.

<sup>149</sup> *Id.* at 18-9.

<sup>150</sup> *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012).

<sup>151</sup> *Id.*

<sup>152</sup> *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1187 (Del. Ch. Dec. 24, 2009).

Section 5.1.6 of the Contract provides the progress payment calculation and subsection 4 states, “[s]ubtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of the ‘General Conditions.’”<sup>153</sup>

The parties testified and confirmed that their payment procedure did not track that detailed in the Contract. Rather, Casale Construction contacted the Voshells directly, whom he believed were working with Red Clay to certify and approve draw payments.<sup>154</sup> Mr. Voshell also confirmed that payments were coordinated between Casale Construction and the Voshells only.<sup>155</sup> Therefore, in reading Section 5.1.6.4, the Court upholds the parties’ practices and acknowledges that the Voshells did not need certification from the Architect to withhold payment.<sup>156</sup>

Accordingly, the decisions to withhold certification in Section 9.5.1 of the General Conditions, would therefore permit the Voshells to withhold payment for seven reasons.<sup>157</sup> Specifically, withheld funds must be supported with evidence of:

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<sup>153</sup> JX-02 at §5.1.6. at p. 4; *See also* JX-107 at §9.5, p. 31.

<sup>154</sup> Trial Tr. Aug. 16, at (unpaginated) 77-78.

<sup>155</sup> Trial Tr. Aug. 23, at 86.

<sup>156</sup> *Pepsi-Cola Bottling Co. of Asbury Park v. PepsiCo, Inc.*, 297 A.2d 28, 33 (1972)(“[T]he parties have a right to renounce or amend the agreement in any way they see fit and by any mode of expression they see fit. They may, by their conduct, substitute a new oral contract without formal abrogation of the written agreement.”).

<sup>157</sup> JX-107 at §9.5.1.

- (1) defective Work not remedied;
- (2) third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;
- (3) failure of the Contractor to make payments properly to Subcontractors or for labor, materials, or equipment;
- (4) reasonable evidence that the Work cannot be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay;
- (5) damage to the Owner or another contractor;
- (6) reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- (7) persistent failure to carry out the work in accordance with the Contract.<sup>158</sup>

According to the evidence, draw proceeds were retained by the Voshells on Draws #12, #13, #15, #16, #17, and #19.<sup>159</sup> The parties agree that the Voshells and Casale Construction had an agreement that the Voshells could keep Draw #13 to cover the out-of-pocket window expenses.<sup>160</sup> However, Mrs. Voshell testified that the parties did not have an agreement for any of the other stated draws.<sup>161</sup>

To start, Mrs. Voshell admitted that the Voshells withheld \$560 from Draw #12 simply because she ordered a cashier's check in the amount of \$38,000 rather than \$38,560.<sup>162</sup> Next, Mrs. Voshell testified that the Voshells withheld part of

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<sup>158</sup> *Id.* at §9.5.1 p. 31.

<sup>159</sup> JX-110.

<sup>160</sup> *Id.*

<sup>161</sup> Trial Tr. Aug. 24 P.M., at 90.

<sup>162</sup> *Id.* at 6



Draw #15 to reimburse themselves for the out-of-pocket windows, although having no agreement with Casale Construction.<sup>163</sup> Mr. Casale testified that the Voshells never explained why they withheld \$6.25 from Draw #16 and never objected to the draw request from Casale Construction.<sup>164</sup> Mrs. Voshell also testified that the decision to withhold money from Draw #17 was, in part, because they were not getting a requested meeting.<sup>165</sup> For all of those draw disbursements, a bank inspector came out to the Property to determine how much work was completed.<sup>166</sup> At no point, did the Voshells disagree with the inspector's conclusion or the payment request from Casale Construction for work completed.<sup>167</sup>

The Court finds that the Voshells breached the Contract by failing to pay Casale Construction full draw payments for Draws #12, #15, #16, and #17. For those draws, the Voshells did not rely on the reasons stated in the Contract or an external agreement with Casale Construction, but rather, unilaterally decided to withhold payment. But the Voshells had reason to withhold Draw #19 under Section 9.5.1 because the home could not be completed for the unpaid balance of the Contract price.<sup>168</sup> By November 2017, the home was only 80.35% completed when

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<sup>163</sup> *Id.* at 22-27, 89.

<sup>164</sup> Trial Tr. Aug. 16, at (unpaginated) 134-35.

<sup>165</sup> Trial Tr. Aug. 27, 2021, N17L-12-054, at 11 (Aug. 27, 2021)(hereinafter "Trial Tr. Aug. 27").

<sup>166</sup> Trial Tr. Aug. 23, at 86.

<sup>167</sup> *Id.* at 88-90.

<sup>168</sup> Trial Tr. Aug. 23, at 93;

the Voshells applied for the last draw and the Voshells were reasonably concerned there would not be enough money to finish the home.<sup>169</sup> Therefore, the Voshells did not breach the contract by withholding Draw #19, but did so with respect to Draws #12, #15, #16, and #17. The withheld amount for these draws was \$8,741.25 and this amount will be awarded to Casale Construction.

### **C. *QUANTUM MERUIT*—CHANGE ORDERS**

The parties agree that Casale Construction is owed compensation for work reflected in the Change Orders. Beyond that, the parties offer competing evidence and testimony to corroborate which work was done by Casale Construction and the proper amounts owed.

Casale Construction asserts a claim for *quantum meruit* to recover the reasonable value of the materials and services rendered to the Voshells.<sup>170</sup> The parties agree that the Voshells ordered \$52,475 in change orders during construction.<sup>171</sup> However, the Voshells contend that only \$27,375 of that work was done by Casale Construction or performed in a workmanlike manner.<sup>172</sup> Conversely, Casale Construction argues that the Voshells owe a total of \$88,878 in change orders.<sup>173</sup>

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<sup>169</sup> JX-12; Trial Tr. Aug. 24 P.M., at 90.

<sup>170</sup> Pl.'s Closing Arg. at 2-3.

<sup>171</sup> PTS at 8.

<sup>172</sup> Defs.' Closing Arg. at 12.

<sup>173</sup> JX-113 (Unpaid Change Orders Chart).

Under Delaware law, the Court may use a *quantum meruit* analysis to parse change orders in construction litigation, where the facts establish that the parties waived the contractual provision governing such modifications.<sup>174</sup> In this case, the parties change order procedure is outlined in Article Seven of the General Conditions.<sup>175</sup> Article Seven requires that change orders must be in writing, signed by the Owner, Contractor, and Architect, and explain the change in work, cost of adjustment, and extent of adjustment on contract time.<sup>176</sup>

However, again the parties' conduct differed from the approval provisions and change orders were done orally or by emails that were signed only by the Voshells. Also, no change orders included the extent of time that would be added to the project. Therefore, the Court finds a *quantum meruit* analysis of the change orders is appropriate.

"In construction litigation, *quantum meruit* is a well-known, and even preferred remedy."<sup>177</sup> "*Quantum meruit* literally means 'as much as he deserves.'"<sup>178</sup> "It is a quasi-contractual remedy by which a plaintiff, in the absence of an express

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<sup>174</sup> *Daystar Sills, Inc. v. Anchor Investments, Inc.*, 2007 WL 1098129, at \*4 (Del. Super. Ct. Apr. 12, 2017).

<sup>175</sup> JX-107 at Art. 7.

<sup>176</sup> *Id.* at Sec. 7.2.1.

<sup>177</sup> *Middle States Drywall, Inc. v. DMS Properties-First, Inc., et al.*, 1996 WL 453418, at \*10 (Del. Super. Ct. May 18, 1996).

<sup>178</sup> *Id.* (citing *Marta v. Nepa*, 385 A.2d 727, 730 (Del. 1978)).

agreement, can recover the reasonable value of the materials or services it rendered to the defendant.”<sup>179</sup>

The Voshells testified that they believed change orders were to be paid from draw funds, but admitted that there was no agreement, verbally or in writing, for any change orders to be paid from the draws.<sup>180</sup> Casale Construction issued invoices for the changes and stated that the change orders were not included in the Contract price.<sup>181</sup> When questioned by the Court, Mr. Casale explained that he expected to be paid at the end of construction, “somewhere down the line,”<sup>182</sup> and “paid on demand.”<sup>183</sup> Work done for change orders was not inspected nor considered by the bank inspector for their draw reports.<sup>184</sup>

In such instances, the Court must make credibility determinations based on the testimony and evidence submitted to make up the record and the patterns of behavior reflected in the testimony and evidence.<sup>185</sup> Typically more weight is given to contemporaneous evidence, “as it is free from the realities of litigation and closer in time to the events that transpired. But this evidence does not always resolve

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<sup>179</sup> *Id.*

<sup>180</sup> Trial Tr. Aug. 24 P.M., at 117-118.

<sup>181</sup> Trial Tr. Aug. 16, at (unpaginated) 190.

<sup>182</sup> *Id.* at 193.

<sup>183</sup> Trial Tr. Aug. 18, at 71.

<sup>184</sup> Trial Tr. Aug. 16, at (unpaginated) 193.

<sup>185</sup> *Trascent Management Consulting, LLC v. George Bouri*, 2018 WL 4293359, at \*10 (Del. Ch. Sept. 10, 2018).

disputes. When the Court only has testimony, and the testimony conflicts, it must determine whose testimony to credit.”<sup>186</sup>

In weighing all of the evidence and testimony, the Court finds that the Voshell’s testimony and evidence is the most accurate representation and chronicle of the change orders for the Property. First, the Voshells testified to their frequent visits to the jobsite and their hands-on discussions with site managers, subcontractors, and Mr. Brown. Moreover, Mrs. Voshell’s detailed records of expenses and Mr. Brown’s recount of Casale Construction struggles is compelling.

Conversely, Mr. Casale hired site managers, Mr. Boyd and Mr. Vitale, to supervise and manage the jobsite and daily activities, and it was typical for the Voshells to request changes directly to them. However, Casale Construction did not offer their testimony. Moreover, Ms. Jamgochian had a key role in the written change order procedure by orchestrating the written invoice and seeking the Voshells approval. But again, the Court did not hear her account either. The Court also must consider the conflated dates on half of the Change Orders, which were issued after Casale Construction and the Voshells ended their working relationship.

While the Court finds the Voshells and their list of change orders is more accurate than that of Casale Construction, it is far from clear what work orders were

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<sup>186</sup> *Id.*

completed and if not, whether they are included in the Voshell's claim that they spent \$55,692.89 for corrective work or the \$164,293.24 to complete construction. The failure to comply with the Contract provisions created a haphazard accounting of the work and the evidence to accept the position of either party regarding what work was actually completed is suspect at best. As such, the Court will provide the parties one last opportunity to clarify the issue in their submissions ordered at the end of this decision. Otherwise, it will utilize the agreed change order total of \$52,475.

**D. DELAWARE PROMPT PAYMENT ACT – 6 DEL. C. § 3501, et seq.**

Casale Construction asserts that since the Voshells failed to make payment within thirty days, as required by the Contract and Section 3506, it is entitled to attorney's fees and interest.<sup>187</sup>

The Voshells assert that they had a good faith and reasonable basis to deny payment, and thus attorney's fees and interest should not be awarded under Delaware Prompt Payment Act.<sup>188</sup> The Voshells argue that Casale Construction had an obligation to pay all subcontractors and materialmen within thirty days of receipt of the draw funds and it failed to comply in several instances.<sup>189</sup> The Voshells explain that Casale Construction's failure to make timely payment resulted in the

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<sup>187</sup> Pl.'s Closing Arg. at p. 16.

<sup>188</sup> Defs.' Closing Arg. at p. 12-13.

<sup>189</sup> *Id.*

filing of two mechanic's liens on their property.<sup>190</sup> Also, the Voshells assert that Casale Construction acted in bad faith when it filed a mechanic's lien on the Property requesting frivolous damages.<sup>191</sup>

The Delaware Prompt Payment Act is codified in Chapter 35 of Title 6 of the Delaware Code.<sup>192</sup> The purpose of the Prompt Payment Act is to require owners and contractors to make timely and prompt payments for construction work.<sup>193</sup> Casale Construction admits it is a contractor as defined in Section 3501.<sup>194</sup> Moreover, the Court finds that the money tendered by the Voshells to Casale Construction were trust funds under §3502 because the funds were received by the contractor in connection with the Contract. The draw funds were released directly to Casale Construction from Citizens or paid by the Voshells.

Under Section 3503, a contractor is prohibited from using funds until all persons involved in the construction of the building have been paid:

[n]o contractor, or agent of a contractor, shall pay out, use or appropriate any moneys or funds described in § 3502 of this title until they have first been applied to the payment of the full amount of all moneys due and owing by the contractor *to all persons* (including surveyors and engineers) furnishing labor or material (including fuel) for the erection, construction, completion, alteration or repair of, or for additions to, such building, whether or not the

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<sup>190</sup> *Id.* at p. 15.

<sup>191</sup> *Id.* at p. 16.

<sup>192</sup> 6 *Del. C.* § 3501 *et seq.*

<sup>193</sup> *Nason Constr., Inc. v. Bear Trap Commercial, LLC*, 2008 WL 4216149, at \*1 (Del. Super. Ct. Aug. 6, 2008).

<sup>194</sup> PTS at 9; 6 *Del. C.* § 3502.

labor or material entered into or became a component part of any such building or addition and whether or not the same were furnished on the credit of such building or addition or on the credit of such contractor.<sup>195</sup>

Section 3504 requires that the contractor pay all persons furnishing labor or materials within thirty days after the receipt of any moneys or funds and failure to do so results in the contractor's violation of the Prompt Payment Act.<sup>196</sup>

Specifically, Section 3504 states:

[f]ailure of a contractor, or of an agent of a contractor, to pay or cause to be paid, in full or pro rata, the lawful claims of all persons, firms, associations of persons or corporations (including surveyors and engineers), furnishing labor or materials (including fuel), as required by § 3503 of this title, within 30 days after the receipt of any moneys or funds for the purposes of § 3502 of this title, shall be prima facie evidence of the payment, use or appropriation of such trust moneys or funds by the contractor in violation of the provision of this chapter.<sup>197</sup>

Section 3505 imposes criminal penalties for failure to comply with the Act.<sup>198</sup>

Section 3506 is titled "Interest penalties on late payments," and provides, in relevant part that:

(a) Each construction contract awarded by owner shall include: (1) A payment clause which obligates the owner to pay the contractor for satisfactory performance under the contract within 30 days of the end of the billing period; [and] (2) An interest penalty clause which obligates the owner to pay the contractor an interest penalty on amounts due in the case of each payment not made in accordance with the payment clause in the contract.<sup>199</sup>

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<sup>195</sup> 6 *Del. C.* § 3503.

<sup>196</sup> *Id.* at § 3504.

<sup>197</sup> *Id.* at § 3504.

<sup>198</sup> *Id.* at § 3505.

<sup>199</sup> *Id.* at § 3506(a)(1) and (2).



The Court finds that Casale Construction is in violation of the Prompt Payment Act. Casale Construction received \$421,988.13 from the Voshells before his termination.<sup>200</sup> However, according to Casale Construction's financial records, only \$355,978.62 was used to pay for material and labor relating to the Voshells' home.<sup>201</sup> Despite receiving this excess, Casale Construction failed to pay multiple subcontractors within the statutorily mandated thirty days.

Michael Cuocolo from P&C Roofing testified regarding their involvement with the Voshell project and P&C Roofing's subsequent mechanics' lien.<sup>202</sup> Mr. Cuocolo is an Estimator and Project Manager at P&C Roofing.<sup>203</sup> Mr. Cuocolo testified that P&C Roofing sent an invoice to Casale Construction for the Voshell project on March 16, 2017, for \$12,622.50.<sup>204</sup> However, it was not paid by Casale Construction until August 11, 2017.<sup>205</sup> Over the course of their work, P&C Roofing issued multiple invoices but as of February 23, 2018, \$53,292.50 was "[o]ver 90 days past due."<sup>206</sup>

Another example to support this practice is Casale Construction's dealings with Brian Foraker. Foraker was hired by Casale Construction to perform labor and

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<sup>200</sup> JX-110.

<sup>201</sup> JX-22.

<sup>202</sup> Trial Tr. Aug. 17, at 4; JX-108.

<sup>203</sup> Trial Tr. Aug. 17, at 5.

<sup>204</sup> *Id.* at 20-21; JX-108 at Ex. 4 (P&C Roofing Mechanic's Lien Complaint Mar. 1, 2018).

<sup>205</sup> JX-108 at Ex. 4.

<sup>206</sup> *Id.* at Ex. 3.

carpentry work on the Property.<sup>207</sup> However, after issuing eight invoices totaling \$34,125.00, Foraker only received partial payment for one invoice, and the rest were unpaid by Casale Construction and over thirty days due.<sup>208</sup> During that time, Casale Construction received \$132,444.38 in draw proceeds.<sup>209</sup>

It appears other overdue invoices from subcontractors include Bell Supply, Comfort Control Heating & Cooling, and Edward Powell Pump & Well Drilling. Mr. Casale admitted while testifying that subcontractors were unhappy because of late payments.<sup>210</sup> Mr. Casale admitted that during this timeframe, the company was struggling financially and so the conduct is not surprising. But the Court holds that Casale Construction's failure to pay these subcontractors and materialmen with funds from the Voshells within thirty days is a violation of its fiduciary duties set forth in Section 3503.

The Court agrees that the Voshells failed to pay some draws within thirty days of receiving notice that work had been completed. But work on the site was not progressing, defective work had been discovered, and eventually the Voshells learned that subcontractors were not being timely paid. While the Court finds that some invoices were not paid within the thirty-day time limitation, the Court does not

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<sup>207</sup> PTS at p. 7, (g).

<sup>208</sup> *Id.* at p. 7.

<sup>209</sup> JX-110.

<sup>210</sup> Trial Tr. Aug. 17, at 213.

find the withholding of payment was done in bad faith and without good cause. Casale Construction's conduct here does not warrant the awarding of attorney's fees and this Court will exercise its discretion under Section 3506 to deny the request for fees and interest.

To the extent that the Voshells have asserted that they have some remedy and right to attorney's fees under the Delaware Prompt Payment Act, the Court disagrees under the facts presented here. They were not in a position to be a payee and had no expectation of recovering payments.

#### **E. CONSUMER FRAUD ACT, NEGLIGENT MISREPRESENTATION, AND INTENTIONAL MISREPRESENTATION**

The Defendants assert intentional misrepresentation, negligent misrepresentation, and a claim under the Consumer Fraud Act ("CFA") in Counts IV and V against Casale Construction and Mr. Casale personally.<sup>211</sup> Specifically, the Voshells argue that, during their relationship, Mr. Casale intentionally misrepresented or omitted material facts to the Voshells regarding payment to subcontractors, materials for the Project, and false invoices and change orders.<sup>212</sup>

First, the CFA provides:

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<sup>211</sup> Defs.' Answ. to Compl. and Statement of Claim for Mechanics' Lien with Affirm. Defenses and Countercl. Against Def. Casale Construction, LLC and Third-Party Compl. against Anthony Casale, Individually, N18L-04-131 RRC, D.I. 12, p. 25-26 (Sept. 14, 2018).

<sup>212</sup> JX-126; Defs.' Closing Arg. at 20-21.

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise...is an unlawful practice.<sup>213</sup>

The sale of a house by a building contractor falls within the scope of the CFA.<sup>214</sup>

But it is well settled that the CFA only applies to misrepresentations made “in connection with the sale, lease or advertisement of any merchandise.”<sup>215</sup> And, the Delaware Superior Court has held that “[p]ost-sale representations which are not connected to the sale or advertisement...do not constitute consumer fraud under the Act.”<sup>216</sup>

The misrepresentations in this case arise from the post-sale construction of the Voshells’ custom home, specifically in connection with draw payments, invoices, change orders, and materials during the construction of the project. The sale was executed when the parties signed the Contract, which is over a year before the alleged misrepresentations. Therefore, this conduct does not fall into the parameters set forth by the CFA and does not arise from Casale Construction’s selling or advertising of its services to the Voshells.

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<sup>213</sup> 6 Del. C. § 2513.

<sup>214</sup> *Murphy v. Berlin Const. Co., Inc.*, 1999 WL 41633, at \*3 (Jan. 22, 1999).

<sup>215</sup> 6 Del. C. §2513.

<sup>216</sup> *Dunfee v. Newark Shopping Center Owner LLC*, 2016 WL 639556, at 4 (Del. Super. Ct. Feb. 16, 2016)(quoting *Norman Gershman’s Things to Wear, Inc. v. Mercedes-Benz of N. Am., Inc.*, 558 A.2d 1066, 1074 (Del. Super. Ct. 1989)); *See also Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 658 (Del. Super. Ct. Oct. 16, 1985).

Next, it is well settled Delaware law that the Court of Chancery has exclusive jurisdiction over claims of negligent misrepresentation.<sup>217</sup> “The one exception to the exclusive jurisdiction of the Court of Chancery would be cases where the negligent misrepresentation claim is raised in the context of the Consumer Fraud Act.”<sup>218</sup> Since the Court found that the Consumer Fraud Act is inapplicable, it does not have jurisdiction over the negligent misrepresentation claim.

Finally, the Court also finds that the Voshells’ intentional fraud claim against Mr. Casale cannot be maintained. The basis for the misrepresentations against Mr. Casale arises from the contractual relationship between the parties. Specifically, representations made regarding draw payments, invoices, materials, and change orders, which are governed by the Contract. “As a general rule under Delaware law, where an action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort.”<sup>219</sup> The Court finds that the misrepresentations focus entirely on the obligations owed by the parties under the Contract and, therefore, cannot support an independent fraud claim.

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<sup>217</sup> *Van Lake v. Sorin CRM USA, Inc.*, 2013 WL 1087583, at \*11 (Del. Super. Ct. Feb. 15, 2013).

<sup>218</sup> *Id.* (quoting *Iacono v. Barici*, 2006 WL 3844208, at \*5 (Del. Super. Ct. Dec. 29, 2006)).

<sup>219</sup> *Midland Red Oak Realty, Inc. v. Friedman, Billings & Ramsey & Co., Inc., et al.*, 2005 WL 445710, at \*3 (Del. Super. Ct. Feb. 23, 2005).

## **VI. CONCLUSION**

In conclusion, the Court makes the following findings:

- (1) Casale Construction did not meet its burden to maintain a Mechanics' Lien against the Voshells' Property.
- (2) Casale Construction did not breach the Contract for failing to provide materials for the Property.
- (3) Casale Construction did not breach the Contract for construction delays.
- (4) Casale Construction did breach the Contract by failing to perform in a workmanlike manner and in conflict with the building code.
- (5) The Voshells breached the Contract by failing to tender full earned draw payments.
- (6) The Voshells violated Section 3506, in Title 6 of Chapter 35 of the Delaware Code by failing to tender earned draw payments.
- (7) The Court finds that the evidence presented does not meet the criteria for punitive damages and none will be ordered.
- (8) The Voshells fraud claim is without merit as the relationship between the parties is based on a contract and not on an independent tort.

Having made these findings, the Court needs the assistance of counsel to clearly set forth in detail what makes up the damage figures submitted in their closing arguments. Many of the figures were stated in general terms and the Court wants to be fair to both parties as to the damages, if any, each are entitled to receive. As such, based on the findings set forth in this Opinion, the Court is asking that counsel set forth in detail the amount of damages you feel are supported and provide detail as to how that figure has been calculated.

Frankly, this is not as easy as one may think. A couple of concerns to consider:

- The home was only 80.35% completed when Casale Construction left.
- There is no clear indication if the materials purchased by the Voshells were installed while Casale Construction was still on the job.
- The corrective work of \$55,692.89, or “work within the Contract” of \$164,293.25 is well defined.
- Identification of the contractual provisions that the parties rely on to establish the award of attorney’s fees or interest.

This submission is to be filed with the Court by August 1, 2022.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.  
Judge William C. Carpenter, Jr.